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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 133

THE CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

On Writ of Certiorari.

BRIEF FOR RESPONDENT.

JAMES & HOBSON,
GEORGE B. MARTIN,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

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No. 983

THE CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

On Writ of Certiorari.

BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

It is our purpose to extend briefly our response to the petition for certiorari.

Respondent was injured while actively engaged in an employment existing in violation of the Child Labor Law of the State of Kentucky.

Since the petitioner is a common carrier engaged in interstate commerce, and the respondent's employment was in such commerce, no compensation for his injuries is obtainable unless the Federal Employer's Liability Act affords relief.

That Act, as frequently stated in decisions, both

Federal and State, is "paramount" and "exclusive".

Cent. Vermont Railway Co. v. White, 238 U. S., 507; 59 L. Ed., 1433; 35 Sup. Ct. Rep. 865.

It gives a cause of action to an employee injured by negligence. Determination of liability, therefore, depends upon a proper understanding of the word "negligence" as used in the Act, the scope of its meaning as intended by Congress.

Remembering that the purpose of the Act was to widen the field of responsibility of the railroads to their employees as evidenced by the elimination of the fellow-servant doctrine and the limitation placed on the effect of contributory negligence, an intention to circumscribe the scope of actionable negligence should not be inferred.

The term was not used in the restricted sense indicating merely "want of care", but expresses the idea in common law terminology of civil liability for injury or death.

The negligence specified in the Act, creating liability, must be ascertained by applying principles of common law as interpreted by the Federal Courts.

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S., 472; 46 Sup. Ct., 564; 70 L. Ed. 1041.

Cent. Vermont Railway Co. v. White, 238 U. S., 507; 59 L. Ed., 1433; 35 Sup. Ct. Rep., 865.

The pertinent inquiry in this case then is whether

negligence in Federal jurisprudence embraces the idea of civil liability arising solely from violation of a statute.

> "In a majority of jurisdictions it is stated as a general rule of law that the violation of a criminal or penal statute is actionable negligence or as frequently stated is 'negligence per se', or 'negligence as a matter of law.' "
>
> 20 R. C. L., Sec. 33, page 38.

> "Violation of statute forbidding employment of children is negligence per se when the violation is the natural and proximate cause of the injury."
>
> 18 R. C. L., Sec. 65, page 553.

> "And if the child is actively engaged in the duties of the employment, the unlawful employment is held to be the proximate cause of the injury."
>
> 18 R. C. L., Sec. 65, page 554.

> "Violation of the Federal Safety Appliance Act by an interstate carrier, is in itself 'negligence', rendering railway company liable for injury to employee under Employers' Liability Act."

> "If Safety Appliance Act is violated question of negligence in the general sense of 'want of care' is immaterial."

> *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; 36 Sup. Ct. Rep. 626; 60 L. Ed. 1110.

> In *Union Pacific Ry. Co. v. McDonald*, 38 L. Ed., 434, 152 U. S., 262,

it was held that non-performance by the Railway

Company of a duty imposed by statute of guarding its slack pit, was a breach of its duty to the public and therefore evidence of negligence, for which it was liable if the injuries were the result of such violation.

> In *Hayes v. Michigan Central Ry. Co.*, 28 L. Ed., 410, 111 U. S., 242,

violation of a city ordinance was held to be evidence of negligence. In the two cases, supra, there was a breach of duty to the public. If the duty imposed had been for the especial benefit of plaintiff, as in the case at bar, the violation would have been negligence per se, rather than mere evidence of negligence.

In *Narramore v. C. C. C. & St. L. Ry. Co.*, 96 Fed., 298; 48 L. R. A., 74, it appeared that the Railway Company had violated an Ohio Statute requiring the blocking of switch frogs resulting in injury to plaintiff. The Court through Circuit Judge Taft, said:

> "We have held that the failure on the part of the railway company to comply with the statute was negligence per se, etc."

Other Federal cases so holding are *C. H. & D. Ry. Co. v. Van Horn*, 69 Fed. 139; *L. E. & W. Ry. Co. v. Craig*, 73 Fed., 642.

> "Where a statute imposes a duty upon a person for the protection or benefit of others, and he neglects to perform that duty, he is guilty of negligence, and is liable to those for whose protection or benefit it was imposed, for any injuries of the character which the statute is designed to pre-

vent and which were proximately caused by such negligence.

20 R. C. L. 38-39

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Schlemmer v. B. R. & P., 205 U. S., 1, 15; 27 Sup. Ct. 407, 51 L. Ed. 681."

W. A. Hoover & Co. v. Denver & R. G. W. R. Co., 17 Fed. (2nd) 881.

"A State statute requiring the stopping of trains approaching grade crossings and requiring those in charge of them positively to ascertain that the way is clear before proceeding to cross, applies in an action under the Federal Employers' Liability Act to recover for death of an engineer killed at a grade crossing because of disobedience of the statute."

"There is no doubt that the statute of Illinois applied in this case."

Frese v. C. B. & Q. Ry. Co., 263 U. S. 1; 44 Sup. Ct. 1; 68 L. Ed. 131.

"An employer of a boy under 15 years of age in a mill or factory in violation of General Code of Ohio Par. 12993, prohibiting such employment, cannot avoid liability for the injury or death of the boy, of which such employment was the proximate cause, on the ground of contributory negligence."

"If the plaintiff in error violated the provisions

of this section, such violation was negligence per se."

Star Fire Clay v. Budno, 269 Fed. 510-511.

"Where plaintiff, a boy between fourteen and sixteen, was injured in the course of his employment by defendant in a steel mill without a certificate required by Act Pa. April 29, 1909, Par. 8, making such employment illegal and a misdemeanor, it was also actionable negligence sufficient to sustain a recovery for the injuries."

"Section 11 of the Act makes violation of the Act a misdemeanor. This certificate the defendant did not have,—indeed, none had been issued,—and its employment of the non-aged plaintiff was without legal warrant and was therefore illegal. But for such illegal employment the plaintiff would not have been in defendant's works and would not have been injured. Under both Federal and State decisions such illegal employment evidenced want of care or negligence on the part of the defendant. *Ry. Company v. Van Horn*, 69 Fed. 139; *Railway v. Craig*, 73 Fed. 642; *Narramore v. Railway*, 96 Fed. 300; *Stehle v. Machine Company*, 225 Pa. 348; 74 Atl. 215; *Jones v. Caramel*, 225 Pa. 644; 74 Atl. 613; *Lenahan v. Pittston*, 218 Pa. 311; 67 Atl. 642; *Queen v. Dayton*, 95 Tenn. 458; 30 L. R. A. 82; *Starmes v. Albion*, 147 N. C., 556; 61 SE 525; 17 L. R. A. (NS) 602; *Nickey v. Steuder*, 164 Ind., 189; 73 NE, 117. To hold otherwise, and to say that employment in violation of the statute was not negligence would be to deprive children of the protection the law was designed to afford them."

Klicke v. Allegheny Steel Co., 200 Fed. 935.

In *Seaboard A. L. R. Co. v. Horton*, 233 U. S.,

492; 34 Sup. Ct., 635; 58 L. Ed. 1062,

this Court refused to give any effect to a North Carolina Statute, the violation of which caused injury to an engineman in the employment of the defendant Railway Company.

The State statute created a cause of action for injuries caused by defective machinery; the Federal statute allows recovery for injury or death resulting from defective machinery only when "due to negligence".

The two statutes being in direct conflict, the Federal Act must prevail with the result that the State statute in an action under the Federal act is ineffective for any purpose.

The exact question involved here was decided adversely to petitioner's contention in *Frese v. Chicago B. & Q. Ry. Co.*, 263 U. S., 1; 44 Sup. Ct. 1; 68 L. Ed. 131.

Petitioner's counsel dispose of this important case by saying that "The court was not there dealing with any attempt to broaden or add to the Federal act"; that this Court in that case in determining the question of plaintiff's negligence "referred" to an Illinois Statute.

This Court's treatment of the State statute was not so casual as counsel assumes.

It not only "referred" to the statute, but quoted it in full and decided that the engineman's violation of it was a complete defense to his personal representa-

tives' claim for damages for his death.

The case we have here is the Frese case turned around; there the plaintiff was denied recovery because her intestate's violation of a State statute caused his death; here the petitioner was held liable because it violated a State statute causing respondent's injury. The Kentucky Court of Appeals followed the Frese case and applied the State statute upon the authority of that case, where under identical conditions this Court said, "There is no doubt that the Statute of Illinois applied to this case."

The Illinois Statute, like the Kentucky Child Labor Law, and unlike the North Carolina Statute, considered in the Horton case, is not in conflict with the Federal Act. Neither the Illinois nor the Kentucky Statute broadens or adds to the Federal Act; both of them are consistent with it and can be applied without doing the least violence to its meaning.

It is true that the existence of a State statute may have an effect upon the result of a suit under the Federal Act, and thereby in a sense affect its uniformity of operation. So a railway company may affect its uniform operation by the adoption of rules relating to service of employees. Such rules may differ from those in force by other carriers, with the result that conduct in the service of one company which is contrary to a rule, might constitute negligence, whereas, the same conduct in the service of another, having none or a different rule, would not be so regarded.

But State laws and railway rules should not be ig-

nored, unless they are out of harmony with the Federal Act.

Federal law prevails, but under Federal law, violation of a valid and unconflicting State statute is negligence within the meaning of the Employers' Liability Act.

Respectfully submitted,

JAMES & HOBSON,
GEORGE B. MARTIN,
Counsel for Respondent.

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